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THE INFLUENCE OF JUSTICE JOHN PAUL STEVENS: OPINION ASSIGNMENTS BY THE SENIOR ASSOCIATE JUSTICE

Charles F. Jacobs* and Christopher E. Smith**

I. INTRODUCTION

The 2010 retirement of Justice John Paul Stevens,¹ one of the U.S. Supreme Court's longest-serving Justices,² and his replacement by Justice Elena Kagan,³ led scholars⁴ and commentators⁵ to evaluate the impact of Stevens⁶ and speculate about how the Court will change in his absence.⁷

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1. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for Obama*, N.Y. TIMES, Apr. 9, 2010, <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html>.

2. Justice Stevens served on the Supreme Court for thirty-four years, two years shy of the record for longevity established by his predecessor, Justice William O. Douglas, who served for thirty-six years. Adam Liptak, *The End of an Era, for Court and Nation*, N.Y. TIMES, Apr. 9, 2010, <http://www.nytimes.com/2010/04/10/us/politics/10judge.html>.

3. Peter Baker, *Kagan Is Sworn in as the Fourth Woman, and 112th Justice on the Supreme Court*, N.Y. TIMES, Aug. 7, 2010, <http://www.nytimes.com/2010/08/08/us/08kagan.html>.

4. See, e.g., Christopher E. Smith, *An Empathetic Approach to Criminal Justice: Pro Bono Experiences Informed Justice Stevens' Understanding of Prisoners' Rights*, SCOTUS BLOG (May 12, 2010, 2:03 PM), <http://www.scotusblog.com/2010/05/an-empathetic-approach-to-criminal-justice/>.

5. See generally, e.g., Editorial, *John Paul Stevens: A Judicial Role Model*, 94 JUDICATURE 4 (2010).

6. See, e.g., Marcia Coyle, *Criminal Justice Will Never Be the Same*, NAT'L L.J. (Apr. 12, 2010), <http://www.law.com>.

7. See, e.g., *What Kagan Will Bring to the Court*, N.Y. TIMES, May 10, 2010, <http://www.roomfordebate.blogs.nytimes.com/2010/05/10/what-kagan-will-bring-to-the-court/>.

Typically, evaluations of Justice Stevens's performance and impact on the Supreme Court focus on his judicial opinions.⁸ However, Justice Stevens also impacted constitutional law and public policy through the roles that he played on the Supreme Court,⁹ including both informal roles, such as serving as the Court's foremost advocate of *Miranda* rights¹⁰ and the adversary system,¹¹ and formal roles, such as the first speaker after the Chief Justice during the Justices' discussions of cases.¹²

One especially important role played by Justice Stevens developed in 1994 when the retirement of Justice Harry Blackmun¹³ made Stevens the senior Justice in the majority¹⁴ for the Court's liberal¹⁵ wing.¹⁶ As senior Justice in the

8. See, e.g., ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE 1–31 (Pa. State Univ. Press 1988); Carol Lee, *Reminiscences of Justice Stevens by his Law Clerks: Three Memorable Opinions*, 94 JUDICATURE 9 (2010); Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010).

9. Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 726–42 (2005).

10. See Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of Miranda Rights*, 60 DEPAUL L. REV. (forthcoming 2011).

11. Smith, *supra* note 9, at 736–38.

12. *Id.* at 727.

13. TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 324–25 (2008).

14. Justice Stevens, who was appointed to the Court in 1975, was joined in the post-Blackmun liberal wing of the Rehnquist Court by junior Justices David Souter (appointed in 1990), Ruth Bader Ginsburg (appointed in 1993), and Stephen Breyer (appointed in 1994), and later,—for one term in the Roberts Court era—by Justice Sonia Sotomayor (appointed in 2009). See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 9, 2011).

15. In this article, the terms “liberal” and “conservative” are used to classify case decisions according to the definitions applied in the Supreme Court Judicial Data Base in which “[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] and anti-government in due process and privacy.” Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

16. During the post-Blackmun Rehnquist Court era (1994–2005), empirical analyses of specific issues demonstrated voting pattern differences between the members of the Court's liberal wing (Justices Stevens, Souter, Ginsburg, and Breyer) and their more conservative colleagues (Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor). See, e.g., Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 171 (2003). This liberal wing remained

majority for cases in which Chief Justice Rehnquist¹⁷—and later Chief Justice Roberts¹⁸—dissented (or did not participate), Justice Stevens gained the authority to choose which Justice in the majority would write the opinion for the Court.¹⁹ Thus, Justice Stevens exercised an important power that has interested scholars who study the Supreme Court.

With respect to the importance of the power to assign opinions, Professor Walter Murphy, one of the first scholars of judicial behavior to theorize about the role and goals of Justices in the creation of public policy,²⁰ examined judicial power, in part, through a review of what he titled “the special case of the [C]hief [J]ustice.”²¹ Murphy noted that the Chief has “some authority which other members of the Court do not possess” that includes the power to assign opinion duties when he is among the majority in a case.²² Murphy argued that this power may bolster the Chief Justice’s influence

distinctive and intact during the first years of the Roberts Court era (2005–2009), *see, e.g.*, Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court’s 2008–2009 Term*, 29 MISS. C. L. REV. 1, 7 (2010), and Justice Sotomayor’s high level of agreement with Justices Stevens, Ginsburg, and Breyer indicated that she simply replaced Justice Souter as the fourth member of the liberal wing during Justice Stevens’s final term on the Court. *Super Stat Pack OT09 Available*, SCOTUS BLOG (July 7, 2010, 10:34 PM), <http://www.scotusblog.com/blog/2010/07/07/super-stat-pack-ot09-available/>.

17. William Rehnquist served as Chief Justice of the United States from 1986 to 2005, a period that included the post-Blackmun years from 1994 to 2005. *See* Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, <http://www.nytimes.com/2005/09/05/politics/politicsspecial1/05f1rehnquist.html>.

18. John Roberts was appointed in 2005 by President George W. Bush to serve as Chief Justice of the United States, a position he held during the final five terms of Justice Stevens’s career. *See* Thomas R. Hensley, Joyce A. Baugh & Christopher E. Smith, *The First-Term Performance of Chief Justice John Roberts*, 43 IDAHO L. REV. 625, 627–29 (2007).

19. *See* LAWRENCE BAUM, *THE SUPREME COURT* 125 (4th ed.) (“If the chief justice voted with the majority, the chief assigns the opinion; in other cases, the most senior justice in the majority makes the assignment. Because so many conference votes are unanimous or nearly so, the chief justice is usually among the majority.”).

20. *See* WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 9 (1964). *See also* Lee Epstein & Jack Knight, *Walter F. Murphy: The Interactive Nature of Judicial Decision Making*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 197, 200 (Nancy Maveety ed., 2006) (a discussion of “Murphy’s role in moving the strategic account of judicial decisions from an intriguing idea to a rapidly expanding and influential form of analysis”).

21. MURPHY, *supra* note 20, at 82.

22. *Id.* at 84.

among the members of the Court, create stronger or larger majority coalitions, serve as a reward or incentive to a particular Justice, or even be used to encourage the departure of a Justice through the withholding of assignments.²³

Murphy's arguments prompted several scholars to test empirically the influence of opinion assignment on the output of the Court. As one might expect, this research focuses almost exclusively on the behavior of the Chief Justice—the member of the Supreme Court who assigns most majority opinion writing duties during a typical term. Particular threads of research include the investigation of assignment patterns,²⁴ the relationship of assignment to issue specialization and work distribution,²⁵ the strategic consideration of opinion assignment as it relates to policy outcomes,²⁶ and the assignment practices during the tenure of particular Chief Justices.²⁷ However, very few authors have analyzed the behavior of the senior Associate Justice (hereinafter “SAJ”), either singly or in the aggregate.²⁸ In order to expand our understanding of the assignment power, this article presents an initial empirical analysis of Justice Stevens's actions and his impact in making opinion assignments through his role as senior Justice in the majority for many Supreme Court decisions. In light of clues about division and partisanship among the Justices who served on

23. *Id.*

24. See generally Elliot E. Slotnick, *The Equality Principle & Majority Opinion Assignment on the United States Supreme Court*, 12 POLITY 318 (1979); Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60 (1979).

25. See generally Saul Brenner, *Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court*, 46 J. POL. 1217 (1984); Saul Brenner, *Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination*, 35 W. POL. Q. 204 (1982); Elliot E. Slotnick, *Judicial Career Patterns and Majority Opinion Assignment on the Supreme Court*, 41 J. POL. 640 (1979); Saul Brenner & Harold J. Spaeth, *Issue Specialization in Majority Opinion Assignment on the Burger Court*, 39 W. POL. Q. 520 (1986).

26. See generally FOREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000); David W. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignment in the U.S. Supreme Court*, 16 MIDWEST J. POL. SCI. 652 (1972).

27. Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72 (1988); Forrest Maltzman & Paul J. Wahlbeck, *Opinion Assignment on the Rehnquist Court*, 89 JUDICATURE 121 (2005).

28. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 129 (1998); MALTZMAN ET AL., *supra* note 26, at 53–55.

the Court since 1994,²⁹ Justice Stevens's assignment practices may reveal particular assignment strategies (if they exist) and their impact on the output of the Court.

II. JUSTICE STEVENS: THE SENIOR ASSOCIATE JUSTICE IN CONTEXT

Amid the political and legal tumult of the post-Watergate era,³⁰ President Gerald R. Ford nominated Seventh Circuit Judge John Paul Stevens to the U. S. Supreme Court to replace a retiring Justice, William O. Douglas.³¹ A retrospective description of Ford's motives concluded that "Ford decided to place independence and professionalism over pandering and gamesmanship as a winning political strategy for filling a vacancy on the Supreme Court."³² President Ford's advisors were drawn to Justice Stevens because his legal skills and moderate political image would avoid roiling the already choppy political waters that existed in the aftermath of the scandals produced by the administration of Richard Nixon, and thereby prevent Democrats from using opposition to the nomination as a political weapon.³³

After being confirmed to fill the seat on the Court vacated by Justice Douglas, Justice Stevens proved to be a more liberal decision maker than many of his Republican political supporters had expected.³⁴ Instead of occupying the Court's

29. See, e.g., Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 6, 2010, <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html> (evidence that the members of the Court's conservative wing increasingly choose law clerks exclusively from among applicants who have served under Republican-appointed court of appeals judges and similar tendencies for the liberal wing's choices from among those who served under Democrat-appointed appellate judges).

30. See BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 183 (2010) ("But a more urgent historical circumstance overshadowed the Stevens confirmation process. His appointment to the Supreme Court played out against national disgust in the judicial system under President Nixon.").

31. *Id.* at 182–97.

32. *Id.* at 183.

33. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 126–31 (1999).

34. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 322 (2d ed. 1985) ("But as the history of Presidential expectations has demonstrated so frequently, nominator Ford was in for a few jurisprudential surprises from the pen of Justice Stevens.").

center, as described by one scholar, “[Justice Stevens] fairly rapidly proved to be found far more frequently with the ‘liberal bloc’ of Justice[s] Brennan and Marshall, increasingly so with the passing of time.”³⁵ By the final years of his career, Justice Stevens was praised by liberals³⁶—and criticized by conservatives³⁷—for being “a passionate leader of the [C]ourt’s liberal wing.”³⁸

A comparison between Justice Stevens and his very liberal,³⁹ long-serving predecessor,⁴⁰ Justice Douglas, is instructive in considering the contextual interaction between longevity on the Court, liberal perspectives, and impact as the SAJ. Despite Justice Douglas’s legacy as a member of a liberal bloc of Justices who produced a transformation of constitutional law in the Warren Court era (1953–1969),⁴¹ his

35. *Id.* at 325.

36. See Editorial, *Justice Stevens*, N.Y. TIMES Apr. 9, 2010, <http://www.nytimes.com/2010/04/10/opinion/10sat1.html> (“Justice Stevens . . . has been an eloquent voice for civil liberties, equal rights, and fairness. Mr. Obama should fill his seat with someone equally committed to these principles.”).

37. See Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, THE NEW YORKER, Mar. 22, 2010, http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin?currentPage=all (“That flexibility and malleability that Stevens talks about is really just a license for a judge to reach any result he wants,” M. Edward Whelan III, a former Scalia clerk who runs the conservative Ethics and Public Policy Center, said.”).

38. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 53.

39. See Phillip J. Cooper, *Justice William O. Douglas: Conscience of the Court*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 189 (Charles M. Lamb & Stephen C. Halpern eds. 1991) (“[Justice Douglas] left the Court with the legacy of a courageous Justice committed to liberty and equality—a person willing to stand for the poor as well as the rich, the political outcast as well as the pillar of the establishment.”).

40. Justice Douglas was appointed to the Supreme Court by President Franklin D. Roosevelt in 1939 and he served until 1975, retiring after being incapacitated by a stroke that he suffered in December 1974. *Id.* at 164, 167.

41. The Warren Court era lasted from 1953 to 1969, DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 36 (3d ed. 1993), a time period defined by Chief Justice Earl Warren’s tenure on the Court. Chief Justice Warren was appointed by President Dwight Eisenhower in 1953 and retired in 1969. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 259, 511–13 (1997). As described by one scholar, “Warren’s Court revolutionized constitutional law and American society: with the unanimous 1954 school desegregation ruling, *Brown v. Board of Education* [347 U.S. 483 (1954)]; . . . and with a series of rulings on criminal procedure that extended the rights of the accused.” O’BRIEN, *supra*, at 106. Because of numerous liberal decisions affecting racial discrimination, rights in the criminal justice process, freedom of religion, and other issues, “[t]he Warren Court is widely recognized to have

ability to alter legal doctrines and their policy consequences came primarily through his own opinion writing rather than through opportunities to choose who would write majority opinions. Despite the more than three decades that Justice Douglas spent on the bench, he held the title of SAJ for just the final four terms of his career.⁴² An Associate Justice can be the senior Justice in the majority for individual cases despite not literally being the longest-serving Justice on the Court,⁴³ but obviously opportunities to assign opinions may increase when there are no other associate Justices with greater seniority. Justice Douglas, for example, was the senior Justice in the majority for thirty-four individual cases from 1946 through 1971, but he assumed that role in sixty-four additional cases during his final four terms when he had more years of service than any other Associate Justice.⁴⁴ By contrast, from his first opportunity to do so in 1992 through his retirement in 2010, Justice Stevens assigned 182 majority opinions,⁴⁵ a number nearly double that of Justice Douglas,

engaged in a liberal constitutional revolution in regard to civil rights and liberties.” THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* xxviii (West Pub. 1997).

42. Justice Douglas spent most of his years on the Court with senior colleague, Justice Hugo Black, who was appointed by President Roosevelt in 1937, two years earlier than Douglas. Congressional Quarterly, *Members of the Court*, in *THE SUPREME COURT AT WORK* 188 (Carolyn Goldinger ed. 1990). Justice Black was the senior Associate Justice from 1946—when the next most-senior Justice, Harlan Fiske Stone, died—until his own retirement in 1971—when Justice Douglas became the senior Associate Justice. *Id.* at 185–86, 190.

43. For example, despite serving in 2010 with three Associate Justices who had more seniority (Justice Stevens, confirmed in 1975; Justice Antonin Scalia, confirmed in 1986; and Justice Anthony Kennedy, confirmed in 1988), *id.* at 206–08, Justice Clarence Thomas, who was confirmed in 1991, O'BRIEN, *supra* note 41, at 118–20, gained the opportunity to make the majority opinion assignment in *Dolan v. United States*, 130 S. Ct. 2533 (2010), when the four dissenters in the case were composed of the chief Justice and the three Associate Justices with greater seniority. As noted by one commentator, “[i]t was probably the first time that Thomas, who has been on the Court for nearly 20 years, was in a position to assign the writing of a majority opinion on a decision in which all nine Justices participated.” Tony Mauro, *Courtside: Thomas Gets a Rare Chance to Assign Decision*, NAT'L L.J., June 16, 2010, <http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202462742820&slreturn=1&hblogin=1>.

44. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 642–49 (4th ed. 2007).

45. This research relies on an examination of majority and dissenting coalitions in all cases decided by the Court from 1994 through the 2009 term.

whose career on the Court was slightly longer than that of Stevens.

This difference in the number of opportunities to assign responsibilities for writing majority opinions reflects contextual differences affecting the respective careers of Justices Douglas and Stevens. Specifically, opportunities are affected by the number of cases in which an SAJ disagrees with the Chief Justice and by the presence of a more senior Associate Justice who joins the majority coalition of which a long-serving associate Justice is a member. Thus, in the case of Justice Douglas, his opportunities to make opinion assignments presumably were affected by his time serving with a Chief Justice, Earl Warren, with whom he agreed on many controversial issues,⁴⁶ and by the presence of Justice

For the seven cases assigned by Stevens in 1992 and 1993, we utilized the opinion-assignment sheets distributed by Chief Justice William Rehnquist to the members of the Court (provided to us with great generosity by Paul J. Wahlbeck, George Washington University) that indicate who assigned the opinion-writing duties in each case. The assignment sheets were available from the Harry Blackmun Papers at the Library of Congress. We were unable to examine the assignment sheets for the period from 1994 onward because no public papers from a sitting or retired Justice that provide that particular information are available. Without this resource, we instead assume that in any instance that the Chief Justice was not a part of the coalition that formed the majority at the time the opinion was released, the senior Associate Justice in the majority awarded opinion-writing duties. This technique is likely to produce some errors in properly identifying the actual assignor of writing responsibility because only the assignment sheets reveal the identity of the Justice authorized to make the choice after the conclusion of any coalition-shifting among the Justices during the process of drafting the opinion of the Court. Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1748–49 (2006). However, without the availability of assignment sheets for recent years, the technique we employ is all that is available for an analysis of this type and is an approach utilized by other scholars. See EPSTEIN ET AL., *supra* note 44, at 655 n.a. This technique also creates a limitation when determining authorship of certain cases—in particular per curiam decisions. In most cases, authorship is indeterminable without the aid of the Chief Justice's assignment sheets because no author is indicated. In a limited number of cases, the Chief Justice contributed or joined a dissenting opinion to the per curiam majority. In these cases, SAJ power was clear. However, because this occurred infrequently, all per curiam cases were excluded from our analysis. Additionally, we have excluded the small number of original jurisdiction cases. Our analysis attempts to describe the ideological valence of the assignments made by Justice Stevens. Original jurisdiction cases, however, often are not identified as liberal or conservative and would confound our results. The data in the tables presented in this paper reflect these absences.

46. In the categories of issue areas used by the Supreme Court Judicial Data Base, Justice Douglas and Chief Justice Warren agreed with each other in

Hugo Black, a like-minded⁴⁷ Associate Justice senior to Douglas whose career overlapped for all but Douglas's final four terms on the Court.⁴⁸ By contrast, Justice Stevens served with three Chief Justices—Warren Burger,⁴⁹ William Rehnquist,⁵⁰ and John Roberts⁵¹—with whom he disagreed relatively frequently.⁵² He was also the Court's longest-serving Associate Justice for the final sixteen years of his career.⁵³ These contextual differences positioned Justice Stevens to exert greater potential influence than Justice Douglas over the outcomes produced by the Court.

It is important to analyze the behavior of Justice Stevens as the majority opinion assigner because scholars argue that the Justice empowered to assign authorship duties can use the power to "pursue[] his [or her] policy goals"⁵⁴ and can "influence the Court by using [assignment choices] as an

more than 77 percent of cases for all categories except tax cases. EPSTEIN ET AL., *supra* note 44, at 587.

47. Justice Douglas agreed with Justice Black in more than 77 percent of cases for all categories of issues, except tax cases and two cases concerning the Privileges and Immunities Clause. *Id.* at 586.

48. *See supra* note 42.

49. The tenures of Chief Justice Burger and Justice Stevens overlapped from 1975 through 1986. Congressional Quarterly, *supra* note at 42, at 206.

50. Justice Stevens served on the Supreme Court during Chief Justice Rehnquist's entire tenure as Chief Justice, from 1986 to 2005. *See supra* note 17. *See also* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 239 (2007) (Justice Stevens presided over the oral arguments at the Supreme Court when Chief Justice Rehnquist was hospitalized with terminal cancer in the final months of his life and his tenure on the Court.).

51. Justice Stevens served with Chief Justice Roberts from the appointment of the new Chief Justice in 2005, Peter Baker, *Bush Nominates Roberts as Chief Justice*, WASH. POST, Sept. 6, 2005, at A1, through the retirement of Stevens in 2010, Stolberg & Savage, *supra* note 1.

52. According to data from the Supreme Court Judicial Data Base, Justice Stevens agreed with Chief Justice Burger at a rate greater than 70 percent of cases in only five of thirteen issue categories. EPSTEIN ET AL., *supra* note 44, at 611. During Chief Justice Rehnquist's tenure as Chief Justice, Justice Stevens agreed with him at a rate greater than 70 percent of cases in only two of thirteen issue categories. *Id.* at 627. In the case of Chief Justice Roberts, initial analyses with respect to specific categories of cases show similarly modest levels of agreement with Justice Stevens. *See* Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2006–2007 United States Supreme Court*, 76 UMKC L. REV. 993, 1000 tbls.5 & 6 (2008); Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2007–2008 United States Supreme Court*, 36 S.U. L. REV. 33, 44–45 (2008).

53. *See* Liptak, *supra* note 2.

54. *See* Wahlbeck, *supra* note 45, at 1733 (discussing the Chief Justice's power to assign authorship duties).

agenda-setting tool.”⁵⁵ Justice Stevens is known to have behaved strategically with respect to some issues, as documented by Linda Greenhouse’s careful analysis of Justice Stevens’s role in the preservation of abortion rights through timely interactions with selected colleagues in specific cases.⁵⁶ Did his strategic behavior extend to his decisions about majority opinion assignments when serving in the role of SAJ?

As noted by observers, “[f]rom a political standpoint, the power to assign an opinion may be used strategically by the senior Justice on a case to secure the fifth vote, in effect, by appealing to a wavering Justice’s pride of authorship.”⁵⁷ Court watchers credit Justice Stevens with strategically using the power to assign majority opinions to influence the outcome of the Court’s decisions on important issues. For example, Professor Jeffrey Rosen asserted that:

Stevens has wielded this [majority opinion assignment] power strategically, assiduously courting [Justice Anthony] Kennedy to maximize the chances of winning five votes. In some instances, Stevens has assigned majority opinions to Kennedy to secure his vote; in others he has chosen to write majority opinions himself in ways that will persuade Kennedy to stay in the liberal camp.⁵⁸

Using a specific example, Linda Greenhouse claimed that:

In 2000, the Court struck down Nebraska’s “partial-birth” abortion prohibition by a 5–4 vote in *Stenberg v. Carhart*[, 530 U.S. 914 (2000)]. Justice Kennedy voted in dissent, and the challenge to Justice Stevens, who had the assigning power as the senior Associate Justice in the majority, was to hold Justice O’Connor in the narrow majority. He assigned the opinion to Justice Breyer, whose opinion in *Stenberg* was almost completely devoid of rhetoric, reading more like an article from a medical journal than a discussion of a constitutional right. The point was to reassure a wary Justice O’Connor that the

55. *Id.*

56. See Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 778 (2010) (“As soon as Justice Stevens saw the trio’s draft [opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (2002)], he sprang into action, running interference between Justice Blackmun and the other three Justices with the ultimate goal of producing an opinion, or as much of an opinion as possible, for the Court.”).

57. BARNHART & SCHLICKMAN, *supra* note 30, at 229–30.

58. Rosen, *supra* note 38, at 53.

Court was deferring to medical judgment, not expanding the right to abortion articulated in [*Planned Parenthood of Southeastern Pennsylvania v.*] *Casey*[, 530 U.S. 914 (2000)]. The effort succeeded.⁵⁹

In addition to potentially influencing the outcomes of specific case decisions, scholars also see the strategic use of majority opinion assignments as “an agenda-setting tool.”⁶⁰ Because the draft majority opinion is circulated before other Justices’ draft opinions, the choice of the majority author will affect the terms of the discussion within the Court’s opinion and, as in Linda Greenhouse’s example concerning Justice O’Connor,⁶¹ influence whether the opinion will preserve the majority vote or persuade additional Justices to join the opinion.⁶² In light of the importance of the opinion-assigning power, we present an empirical examination of opinion assignments in order to discern whether and how it contributes to our knowledge about Justice Stevens’s influence and impact on the U.S. Supreme Court.

III. JUSTICE STEVENS AND THE POWER TO ASSIGN MAJORITY OPINIONS

Justice Stevens served as the dominant senior Associate Justice (hereinafter “dominant SAJ”)⁶³ for sixteen terms, filling this role from 1994 until 2010.⁶⁴ A “dominant SAJ” is a Justice who—as a result of seniority, the stability of the membership of the Court, and ideological position—dominates the assignment of opinion-writing duties when the Chief Justice is not in the majority.⁶⁵ Specifically, when acting in this capacity, the dominant SAJ will assign more opinions than all of the remaining Associate Justices combined.⁶⁶ Although Justice Stevens made 182 total majority opinion assignments in his career, seven of those assignments came between 1992 and 1994,⁶⁷ prior to Justice

59. Greenhouse, *supra* note 56, at 782.

60. Wahlbeck, *supra* note 45, at 1733.

61. Greenhouse, *supra* note 56, at 782.

62. Wahlbeck, *supra* note 45, at 1734.

63. The “dominant SAJ” concept was developed and defined by co-author Charles F. Jacobs for this article.

64. See *supra* notes 13–14 and accompanying text.

65. See *supra* note 63.

66. *Id.*

67. *West Lynn Creamery, Inc., v. Healy*, 512 U.S. 186 (1994); Dep’t of

Blackmun's retirement and, therefore, prior to Justice Stevens becoming the dominant SAJ.⁶⁸ As illustrated in Table 1, for nine of his sixteen years in this position, Justice Stevens assigned all of the cases that fell to the SAJ for assignment and, as the dominant SAJ, was never responsible for fewer than 75 percent of the total assignments made by Associate Justices. The greatest number of assignments he made in a single term came in 2004 when he selected the majority opinion author on twenty-two occasions. This constituted 88 percent of the total number of SAJ assignments and nearly 30 percent of all the assignments for the term. This rather large number of assignments by Stevens in 2004—more than 50 percent higher than in any other term—is explainable by the additional responsibilities that fell to Justice Stevens when Chief Justice William Rehnquist was absent while receiving treatment for thyroid cancer.⁶⁹ The data in Table 1 indicate clearly that Justice Stevens, more so than any other Associate Justice, was for nearly twenty years a key decision maker responsible for assigning majority opinions when the Chief Justice dissented, especially during the lengthy sixteen-year period for which he was the dominant SAJ.

Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383 (1994); Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994); Oregon Waste Systems, Inc. v. Dep't of Env'tl. Quality of the State of Oregon, 511 U.S. 93 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

68. See *supra* note 45.

69. Chief Justice Rehnquist missed forty-four oral arguments during his terminal illness in 2004 and 2005. LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 8 (2008).

Table 1: Majority Case Assignments by Senior Associate Justices, 1994–2009 Terms

Year	Total Cases Per Term	Cases Assigned by All SAs	Percent of Total Cases	Assigned by Stevens as SAJ	Percent of SAJ Assignments by Stevens
<i>1992</i>	<i>108</i>	<i>14</i>	<i>13.0%</i>	<i>1</i>	<i>7.1%</i>
<i>1993</i>	<i>85</i>	<i>17</i>	<i>20.0%</i>	<i>6</i>	<i>35.3%</i>
1994	82	13	15.9%	13	100%
1995	77	11	14.3%	11	100%
1996	80	10	12.5%	10	100%
1997	91	10	11.0%	10	100%
1998	77	14	18.2%	14	100%
1999	75	9	12.0%	9	100%
2000	78	15	19.2%	13	86.7%
2001	76	13	17.1%	12	92.3%
2002	72	9	12.5%	9	100%
2003	72	14	19.4%	14	100%
2004	74	25	33.8%	22	88.0%
2005	71	8	11.3%	8	100%
2006	67	10	14.9%	8	80.0%
2007	67	8	11.9%	7	87.5%
2008	74	14	18.9%	12	85.7%
2009	73	4	5.5%	3	75%
	1399	218	15.6%	182	83.5%

Italicized figures indicate the years prior to Justice Blackmun's retirement in which Justice Stevens had not yet become the dominant SAJ.

The SAJ assigns majority opinions in those cases for which the Chief Justice is a dissenter or does not participate in the Court's decision.⁷⁰ Cases in the former category arise when the Chief Justice disagrees with a matter of consensus among the other Justices, as when the Chief Justice is a solo dissenter or one of only two dissenters.⁷¹ These cases also arise when the Court is deeply divided and the Chief Justice,

70. See BAUM, *supra* note 19, at 125.

71. For example, in *Chandler v. Miller*, 520 U.S. 305 (1997), Chief Justice Rehnquist was the lone dissenter when eight Justices invalidated a Georgia statute requiring drug testing of political candidates. Justice Stevens had the opportunity to select the majority opinion author from among a wide array of colleagues and he chose Justice Ginsburg for the task.

while joined by like-minded colleagues, supports a case outcome that is endorsed by fewer than five Justices.⁷² Table 2 shows how frequently these situations arose during the years when Justice Stevens was SAJ for opinion assignments and, moreover, provides a picture of the issue areas for which Justice Stevens was able to potentially exert influence through the assignment power.⁷³ In addition, Table 2 shows the distribution of opinion assignments by Justice Stevens as he chose which colleagues would write for the majority in specific cases.

His choice of opinion writer may have been based on the exercise of strategic thinking by Justice Stevens and he has acknowledged employing a strategic approach in at least some of those assignment decisions. As described by Professor Jeffrey Rosen after interviewing Justice Stevens:

When he is in the majority, Stevens is careful not to lose votes that start off on his side, often assigning the opinion to Kennedy when Kennedy seems to be on the fence. "Sometimes," he told me, "in all candor, if you think somebody might not be solid" after casting a vote in conference, "it might be wiser to let that person write the opinion," because after defending a position at length, people "tend to become even more convinced" than when they started. For example, Stevens was effective in winning over Kennedy by asking him to write the majority opinion in *Lawrence v. Texas*,⁷⁴ the 2003 decision striking down sodomy laws, which many liberals consider the *Brown v. Board of Education*⁷⁵ of the gay rights movement. "It worked out O.K.," Stevens told me with typical understatement. "I don't know if I'm entitled to the credit or Tony's entitled to the credit, because he wrote

72. For example, in *Richardson v. McKnight*, 521 U.S. 399 (1997), Chief Justice Rehnquist joined three other dissenters in disagreeing with the five-member majority's decision that corrections officers employed by private firms rather than by the state do not enjoy the benefits of qualified immunity against civil rights lawsuits by prisoners. Justice Stevens chose Justice Breyer to write the majority opinion, perhaps to seek an opinion in tone and content would retain the support of all five members of the narrow majority.

73. We are using the categories employed by EPSTEIN ET AL, *supra* note 44, at 246, to distinguish among the issue areas treated by the Justices. These include criminal procedure, civil rights, economic cases, judicial process and procedure, First Amendment cases, issues of federalism, due process, privacy, unions, and federal tax issues. *Id.*

74. *Lawrence v. Texas*, 539 U.S. 558 (2003).

75. *Brown v. Board of Education*, 347 U.S. 483 (1954).

an exceptional opinion.”⁷⁶

Justice Stevens also had the option of assigning opinions to himself in order to craft his reasoning strategically as a means to gain or maintain the vote of one or more specific Justices.⁷⁷ As Professor Rosen wrote:

In other cases, Stevens has written the majority opinion himself in an effort to shore up Kennedy’s vote. In April [2007], for example, in a 5-to-4 case,⁷⁸ the [C]ourt allowed a lawsuit to proceed against the Environmental Protection Agency for its refusal to regulate global warming under the Clean Air Act; by citing several of Kennedy’s previous opinions in his own opinion, Stevens persuaded Kennedy to stay in the liberal camp.⁷⁹

Although Professor Rosen is not alone in crediting Justice Stevens with strategic thinking in opinion-assignment decisions, conclusions about the impact of those decisions are obviously speculative. For example, Justice Kennedy has never stated that assignments to him or the phrasing of decisions by Justice Stevens led him to vote in a specific way on a case.

As indicated by Table 2, among the 182 majority opinion assignments Justice Stevens made during his career, he most frequently assigned authorship in criminal procedure cases (sixty-five cases or 35.7 percent of the total). He made just under half as many assignments in civil rights cases with a total of thirty-two. Significant numbers of assignments were also made for economic issues (twenty), as well as judicial process and the First Amendment (each with seventeen). Much more infrequently, Stevens had the chance to assign authorship in due process (six), privacy (five), union (four), and tax cases (two). He also had regular opportunities to challenge Chief Justice Rehnquist for dominance in the area of federalism, an area of law that held particular interest for the Chief Justice, with a total of fourteen case assignments.

76. Rosen, *supra* note 38, at 53–54.

77. See Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004, <http://www.csmonitor.com/2004/0709/p01s03-usju.html> (“Sometimes the assigning justice assigns the case to himself and then assumes the role of judicial diplomat, taking care to adequately address the concerns of each member of the majority.”).

78. *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497 (2007) (citation not included in original).

79. Rosen, *supra* note 38, at 54.

Table 2: Justice Stevens as S&J and the Assignment of Majority Opinions by Justice and Issue Area

Justice	Crim	CivR	Econ	JudP	1st	Fed	DP	Privacy	Union	Flax	Total
Stevens	19	9	7	5	8	7	4		2		61 (34%)
Ginsburg	8	4	3	5	2	2		1	1	1	27 (15%)
Kennedy	9	4	1	1	4	1	1	3		1	25 (14%)
Souter	11	2	2		3	1	1				20 (11%)
Breyer	7	5	1	3		1		1	1		19 (10%)
O'Connor	3	5	1			1					10 (5%)
Scalia	6	1	1	1		1					10 (5%)
Thomas	2	1	4	1							8 (4%)
Alito		1		1							2 (1%)
Total	65 (36%)	32 (18%)	20 (11%)	17 (9%)	17 (9%)	14 (8%)	6 (3%)	5 (3%)	4 (2%)	2 (1%)	182 (100%)

Total percentages do not equal precisely 100% due to rounding

As previous research has indicated, SAJs tend to assign more cases to themselves than to any other Associate Justice.⁸⁰ Stevens proves to be no exception to this phenomenon, giving himself the opportunity to pen sixty-one decisions or 34 percent of all his assignments. Nearly one-third of the self-assignments (nineteen) were made in the area of criminal procedure. He also kept 28 percent of the civil rights assignments (nine) and 47 percent of the First Amendment assignments (eight) for himself while distributing away all of the privacy and federal tax decisions. As a percentage of cases in each issue area, however, Stevens wrote the greatest proportion of decisions in the area of due process, serving as the decision author in four of the six cases that he had the power to assign. Similarly, he wrote half of the fourteen federalism cases and half of the four union cases. By comparison, he wrote just 29 percent of the criminal procedure decisions that he assigned.

One set of scholars who have conducted statistical studies of the assigning practices of SAJs concluded that “the [A]ssociate [J]ustice . . . largely assigns opinions to those [J]ustices who are ideologically allied” when not assigning the opinion to him- or herself.⁸¹ As Table 2 shows, this conclusion is generally accurate when looking specifically at the opinion-assigning behavior of Justice Stevens. He made a total of 36 percent of his opinion assignments to the three Justices (Ginsburg, Breyer, and Souter) who most frequently shared his conclusions about case outcomes.⁸² However, as possible evidence of strategic behavior, he deviated from the general conclusion of the aforementioned statistical studies⁸³ by making more opinion assignments to Justice Kennedy (14 percent) than he did individually to his usual allies, Justices Souter (11 percent) and Breyer (10 percent), despite the fact that his rates of agreement on case outcomes with Justice Kennedy were markedly lower.⁸⁴ In particular, Justice

80. MALTZMAN ET AL, *supra* note 26, at 53.

81. *Id.*

82. For example, during the Rehnquist Court era, Justice Stevens had his highest rates of agreement for civil rights cases with Justices Ginsburg (91.5%), Breyer (92%), and Souter (86.0%). EPSTEIN ET AL, *supra* note 44, at 626–27 tbls.6–9.

83. See *supra* note 80 and accompanying text.

84. For example, Justice Stevens and Justice Kennedy only agreed with each other in 65.3% of civil rights cases during the Rehnquist Court era.

Stevens assigned a higher number of criminal procedure cases to Justice Kennedy (nine) than he did to anyone other than himself (nineteen) and Justice Souter (eleven), despite the fact that he agreed with Justice Kennedy in only 53.8 percent of criminal procedure cases.⁸⁵ This may provide evidence that Justice Stevens strategically assigned opinions to Justice Kennedy in accordance with the widely-recognized notion that:

[t]he key to exerting influence within the high court is the ability to hold the majority during the opinion writing process. Sometimes this is done by assigning the case to the justice who is most likely to jump to the other side should the opinion be written too narrowly or too broadly.⁸⁶

It is similarly notable that in three out of four privacy cases,⁸⁷ Justice Stevens assigned the opinion to Justice Kennedy. Justice Stevens has been described as “notably successful in building majorities by courting his fellow [J]ustices—in particular, [Justice] Kennedy.”⁸⁸ In the previously mentioned blockbuster case of *Lawrence v. Texas*,⁸⁹ concerning the invalidation of criminal laws aimed at gays’ and lesbians’ private, non-commercial sexual conduct, Justice O’Connor provided a sixth vote to strike down the law, but she based her conclusion on equal protection grounds.⁹⁰ Justice Stevens needed to retain Justice Kennedy’s vote in order to have a majority that placed private sexual conduct squarely under the privacy aspect of the due process right to

EPSTEIN ET AL, *supra* note 44, at 626 tbls.6–9.

85. *Id.*

86. Richey, *supra* note 77.

87. Among the cases assigned by Justice Stevens that are in the Privacy category of the Supreme Court Judicial Data Base, Justice Kennedy wrote majority opinions for *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state ballot issue barring localities from enacting antidiscrimination laws to protect gays and lesbians), *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state statute criminalizing consensual, non-commercial, private sexual behavior by same-sex couples), and *Gonzales v. Oregon*, 546 U.S. 243 (2006) (ruling against use of federal drug law to block physician-assisted suicides authorized by state law). Justice Ginsburg wrote the majority opinion in the fourth case, *Chandler v. Miller*, 520 U.S. 305 (1997) (invalidating state statute requiring drug testing of candidates for political office).

88. Rosen, *supra* note 38, at 53.

89. *Lawrence*, 539 U.S. at 558. See *supra* notes 74–75 and accompanying text.

90. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

liberty. Two other opinions assigned to Justice Kennedy by Justice Stevens concerned privacy-related issues. One addressed discriminatory laws targeting gays and lesbians⁹¹ and the other addressed a state's right-to-die law.⁹² Both cases had six-member majorities,⁹³ but Justice Stevens may have assigned the opinions to Justice Kennedy for fear that opinions written in a too-liberal manner may have lost the votes of both Justices Kennedy and O'Connor and thereby turned the outcome in a different and, in the view of Justice Stevens, undesirable direction.

There are also cases involving the other Justices with generally conservative voting records in which Justice Stevens may have assigned the opinion to the most tentative member of the majority in order to retain his or her support for a liberal outcome. In *Grutter v. Bollinger*,⁹⁴ for example, the major case that is regarded as narrowly preserving the use of race as one factor for admissions decisions in higher education,⁹⁵ Justice Stevens assigned the opinion to Justice O'Connor whose opinion in the 5-to-4 decision endorsed the way that the University of Michigan School of Law applied demographic factors as one component of admissions decisions.⁹⁶ Justice O'Connor's record of inconsistent support for affirmative action is encapsulated in one scholar's description of her decisions on the issue:

Throughout [Justice] O'Connor's career on the high bench, she was a swing vote on the preferential use of racial criteria in hiring, promotion, and termination of employment decisions, sometimes approving but more often invalidating affirmative action plans for their failure

91. *Romer*, 517 U.S. 620.

92. *Gonzales*, 546 U.S. 243.

93. The six-member majorities in both cases consisted of Justices Stevens, Souter, Ginsburg, Breyer, Kennedy, and O'Connor.

94. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

95. See, e.g., NANCY MAVEETY, *QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA* 93 (2008) ("[T]he Rehnquist Court considered the two cases from the University of Michigan and its law school; these became the vehicle for the majority's decisive and final statement on the policy practice of affirmative action.").

96. See FRANK J. COLUCCI, *JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* 126 (2009) ("In *Grutter*, the Court affirmed the constitutionality of the University of Michigan's law school admissions program, which took race into account to admit a 'critical mass' of students from three specific racial and ethnic groups.").

to incorporate a narrowly tailored use of racial classifications.⁹⁷

In light of the uncertain strength of Justice O'Connor's support for affirmative action in higher education, according to Jeffrey Toobin, Justice Stevens made a strategic self-sacrifice in assigning the opinion to her:

The [opinion assignment] decision was up to Stevens, because he was the senior [Associate Justice in the majority]. . . . Would Stevens really be selfless enough to hand off *Grutter*. . . ? He had just turned eighty-three. How many more big opinions could he expect to come his way? . . .

[Justice] Stevens's decision took wisdom and selflessness. [Justice] O'Connor was clearly the shakiest member of the majority in *Grutter* and if Stevens had kept the case for himself—as many other [J]ustices might have done in similar circumstances—he might ultimately have lost her vote and thus the majority. But Stevens cared more about the issues and less about his own ego So, with the shrewdness of age, Stevens handed the prize *Grutter* assignment—the biggest case since *Bush v. Gore*—to [Justice] O'Connor.⁹⁸

Justices Antonin Scalia and Clarence Thomas wrote Stevens-assigned opinions in cases that bore the same characteristics: a lone conservative Justice joining the four most liberal Justices (Stevens, Ginsburg, Breyer, and Souter) to provide the crucial fifth vote that produced a liberal decision.⁹⁹ However, because Justices Scalia and Thomas typically display such certitude about how their originalist approach to constitutional interpretation produces correct results,¹⁰⁰ it is more difficult to attribute to Justice Stevens

97. MAVEETY, *supra* note 95, at 93 (citation omitted).

98. TOOBIN, *supra* note 50, at 222–23.

99. For example, Justice Scalia wrote the majority opinion in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). See *infra* notes 101–02 and accompanying text. Justice Thomas wrote the majority opinion in *United States v. Bajakajian*, 524 U.S. 321 (1998). See *infra* note 103–04 and accompanying text.

100. For examples of assertive originalist opinions by Justice Scalia and Thomas, see *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (Scalia majority opinion employing originalist interpretation to identify a limited Second Amendment right to ownership of handguns kept in a home for self-defense purposes), and *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (relying on originalism to argue that the Eighth Amendment's

the credit for using opinion assignments to gain their votes. Thus Justice Scalia's Stevens-assigned majority opinion in *United States v. Gonzalez-Lopez*¹⁰¹ concerning a criminal defendant's Sixth Amendment right to choose his own counsel addressed an issue that may have flowed naturally from Justice Scalia's originalist approach, as "Justice Scalia has become known for a strict, almost absolutist position on the Sixth Amendment's various guarantees."¹⁰² However, in a case of first impression for which there may be a lack of consensus about the Constitution's original intent, these Justices may have been susceptible to influence through Justice Stevens's opinion assignment decisions aimed at gaining or maintaining a slim majority. In one possible example, Justice Thomas wrote the opinion for a five-member majority in *United States v. Bajakajian*,¹⁰³ a decision supporting a criminal defendant's Excessive Fines Clause claim that Justice Kennedy, in dissent, decried as "the first time in history [that] the Court strikes down a fine as excessive under the Eighth Amendment."¹⁰⁴

Justice Stevens himself modestly downplays perceptions about his own influence.¹⁰⁵ Commentators write about "the ability of John Paul Stevens, the senior associate justice in tenure as well as in age, to deliver a majority"¹⁰⁶ and "his unique combination of personality and persuasiveness."¹⁰⁷ Yet, Justice Stevens claims that outsiders possess exaggerated beliefs about the Justices' ability to change each others' minds¹⁰⁸ because it is difficult to persuade people to

protections do not apply to conditions or events inside prisons).

101. *Gonzalez-Lopez*, 548 U.S. at 140.

102. Linda Greenhouse, *Justices Uphold Basic Right to Choose Defense Lawyers*, N.Y. TIMES, June 27, 2006, <http://www.nytimes.com/2006/06/27/washington/27scotus.html>.

103. *Bajakajian*, 524 U.S. at 321.

104. *Id.* at 344 (Kennedy, J., dissenting).

105. Interview by Christopher E. Smith with Justice John Paul Stevens, Associate Justice (ret.), U.S. Supreme Court, Washington, D.C. (July 29, 2010).

106. Linda Greenhouse, *Roberts Is at Court's Helm, but He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, <http://www.nytimes.com/2006/07/02/washington/02scotus.html>.

107. David G. Savage, *Sizing Up the Supreme Court After Justice John Paul Stevens*, L.A. TIMES, Mar. 22, 2010, <http://articles.latimes.com/2010/mar/22/nation/la-na-court-stevens22-2010mar22>.

108. See, e.g., Rosen, *supra* note 38, at 53.

In general, Stevens said, the idea that a [J]ustice can sway his colleagues through collegiality and personal lobbying—a talent often

alter their conclusions after they have read the lawyers' briefs and heard oral arguments in a case.¹⁰⁹ According to Justice Stevens, "you very rarely win votes if there aren't five votes persuaded after our conference. . . . Very rare."¹¹⁰ Justice Stevens's reluctance to claim credit for influencing the outcomes of decisions is completely consistent with his characteristic modesty.¹¹¹ However, he has acknowledged assigning majority opinions in close cases to "somebody [who] might not be solid"¹¹² in their support for the initial majority's conclusions. This acknowledgement leaves open the possibility that the foregoing examples may accurately describe situations in which he was "successful in building majorities by courting his fellow Justices . . . [through] methods of persuasion [that] are intellectual rather than personal, and . . . are closely tied to the [C]ourt's procedure for deciding cases"¹¹³—including the procedure for opinion assignments by the SAJ.

IV. OPINION ASSIGNMENTS AND THE IMPACT OF JUSTICE STEVENS AS DOMINANT SENIOR ASSOCIATE JUSTICE

As the discussion in the preceding section indicates, there is evidence that Justice Stevens employed strategic opinion-assignment practices. However, analysts must necessarily speculate about how those strategies operated in individual cases. It is perhaps easier to evaluate the impact of majority opinions assigned by Justice Stevens to himself or to individual colleagues by examining the extent to which those

attributed to Justice William J. Brennan, Jr.—is exaggerated. He suggested that in most cases, [J]ustices cannot be swayed to change their votes once they make up their minds, and when they can be swayed, it is only as a result of legal arguments, not charm or charisma.

Id.

109. Interview, *supra* note 105.

110. Rosen, *supra* note 38, at 53.

111. See, e.g., Cliff Sloan, *In Praise of John Paul Stevens*, MSNBC.COM (May 6, 2005), http://webcache.googleusercontent.com/search?q=cache:B7BgU6c1tOUJ:msnbc.msn.com/id/7748622/ns/newsweek-newsweek_national_news+Cliff+Sloan,+%22In+Praise+of+John+Paul+Stevens%22&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a ("With his bow-tied, Midwestern demeanor and perpetual air of genial bemusement, he is the quintessential nice guy . . .").

112. Rosen, *supra* note 38, at 53.

113. *Id.*

opinions decided issues in “important cases”¹¹⁴ because opinions in such cases “may be able to influence the development of significant policy consequences for American society.”¹¹⁵ The following discussion presents selected examples of important Stevens-assigned opinions, using standard scholarly sources for labeling cases as “important,”¹¹⁶ as a means for illuminating the impact that Justice Stevens had in his role as dominant SAJ.

114. There is no consensus among scholars about evaluating the significance of specific Supreme Court decisions. Beverly Blair Cook, *Measuring the Significance of United States Supreme Court Decisions*, 55 J. POL. 1127, 1127 (1993). The concept of “important cases” is typically employed by scholars through the use of sources, such as textbooks and newspaper articles, that selectively highlight the Supreme Court’s most significant decisions during a given term. See Christopher E. Smith, Joyce Ann Baugh, Thomas R. Hensley & Scott Patrick Johnson, *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 79 (1994).

115. Scott P. Johnson & Christopher E. Smith, *David Souter’s First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 241 (1992).

116. For Supreme Court decisions through the 2004 term, “important” cases are those that were labeled as such by both the *New York Times* and *Congressional Quarterly* and organized for presentation in EPSTEIN ET AL., *supra* note 44, 93–174. For the 2005 through 2009 terms, the *New York Times* is the sole source, highlighting cases in end-of-year summaries of the Supreme Court’s recent terms: 2005 term—Greenhouse, *supra* note 106; 2006 term—*Notable Cases of the 2006–7 Term So Far*, www.nytimes.com/ref/washington/scotuscases_PUNITIVEDAMAGES.html (last visited Jan. 9, 2011); 2007 term—*Major Rulings of the 2007–8 Term* (June 29, 2008), <http://graphics8.nytimes.com/images/2008/06/29/Washington/majorFull.jpg>; 2008 term—*Major Rulings of the 2008–9 Term*, N.Y. TIMES, July 1, 2009, <http://www.nytimes.com/imagepages/2009/07/01/us/01scotus.graphic1.html>; 2009 term—*Major Rulings of the 2009–2010 Term*, N.Y. TIMES, June 30, 2010, http://www.nytimes.com/imagepages/2010/06/30/us/politics/30scotus-graphic.html?ref=supreme_court. These sources fit the specific criteria employed by scholars in selecting Supreme Court cases for analysis based on the importance of the case.

Numerous criteria can be utilized to assess the importance of Supreme Court cases, depending on the purposes and requirements of the researcher. Our research requires that we use sources which have several characteristics: (1) the source should be familiar and legitimate to researchers in the field; (2) the source should be current, allowing us to classify recently decided cases; (3) the source should be reliable, allowing researchers to produce the same list of important cases; and (4) the source should be consistent over time.

HENSLEY *et al.*, *supra* note 41, at 864.

A. Legal Protections for Gays and Lesbians

As previously described, two opinions that Justice Stevens assigned to Justice Kennedy provided the constitutional basis for preventing states from enacting laws that would treat gays and lesbians as less deserving than other citizens of the protection of the law. In *Romer v. Evans*,¹¹⁷ Justice Kennedy's opinion on behalf of a six-member majority invalidated, on equal protection grounds, a referendum approved by Colorado voters that barred municipalities from enacting anti-discrimination ordinances to protect gays and lesbians from unfair treatment in housing, employment, and other important aspects of life. The significance of the decision was evident in the conflict among the Justices that was visible at the oral announcement of the decision:

For extra emphasis and to get more notice, [Justice] Scalia read portions of his dissenting statement from the bench that May morning. His voice rising as he condemned the ruling, Scalia said the decision in *Romer v. Evans* undermined the structure of American law that he said allowed distinctions between homosexual and heterosexual conduct. [Justice] Scalia accused the Court of signing on to the "so-called homosexual agenda." A few minutes earlier, Kennedy had read aloud parts of his opinion, a document that would later cause a number of gay and lesbian lawyers to weep in appreciation. Such was the power of the competing emotions the opinions roused.¹¹⁸

Similarly, Justice Kennedy's Stevens-assigned majority opinion in *Lawrence v. Texas*, broke new ground in its declaration with respect to the liberty interests that protect private sexual conduct for all adults. As described by Jeffrey Toobin:

There was no mistaking the significance of Kennedy's opinion. The point was not that the Court was halting sodomy prosecutions, which scarcely took place anymore. Rather, the Court was announcing that gay people could not be branded as criminals simply because of who they

117. *Romer v. Evans*, 517 U.S. 620 (1996).

118. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 218 (2009).

were. They were citizens. They were like everyone else. . . . The people who had devoted their lives to that cause understood precisely what had happened, which was why, to a degree unprecedented in the Court's history, the benches [in the courtroom] were full of men and women sobbing with joy.¹¹⁹

Whether or not strategic opinion assignments by Justice Stevens were necessary to maintain the majorities for these two decisions, he was a key figure in these decisions that expanded the protection of the law to people historically victimized by discriminatory treatment.

B. Criminal Sentences

Justice Stevens assigned opinions in important cases that advanced his career-long preference for narrowing the circumstances in which capital punishment could be permissible.¹²⁰ In *Ring v. Arizona*,¹²¹ Justice Stevens assigned to Justice Ginsburg the responsibility for writing the majority opinion that invalidated on Sixth Amendment grounds capital sentencing schemes that permitted judges to justify the imposition of the death penalty by employing factual findings not made by the jury. Justice Ginsburg's opinion reversed the Court's earlier precedent—*Walton v. Arizona*¹²²—which had permitted such sentencing practices. In overturning this precedent, Justice Ginsburg's opinion effectively advanced the very arguments that Justice Stevens had presented in a dissenting opinion in *Walton* concerning his views about the Sixth Amendment's requirement that factual determinations for sentencing purposes be made by the jury during trial and not by the judge as a post-trial conclusion.¹²³ The *Ring* decision was one of a series of cases in which the Court followed Justice Stevens's *Walton* dissent and required jury fact-finding for sentencing in non-capital contexts, too. Among these other decisions was *Blakely v.*

119. TOOBIN, *supra* note 50, at 190.

120. See generally, James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607 (2006) (discussion of Justice Stevens's role the development of the Supreme Court's capital punishment jurisprudence).

121. *Ring v. Arizona*, 536 U.S. 584 (2002).

122. *Walton v. Arizona*, 497 U.S. 639 (1990).

123. *Id.* at 708 (Stevens, J., dissenting).

Washington,¹²⁴ an important Stevens-assigned opinion in which Justice Scalia found a violation of the Sixth Amendment right to trial by jury when a state non-capital sentencing procedure permitted post-trial factual determinations by the judge to play a role in enhancing the offender's sentence.¹²⁵ Because the Court now has a series of precedents on this issue and these precedents are supported by conservative Justices Scalia and Thomas, Justice Stevens's impact on this area of law may have staying power even if the Court's composition becomes more conservative in the future.

In considering the categories of offenders and offenses eligible for the death penalty, Justice Stevens assigned to himself the majority opinion in *Atkins v. Virginia*,¹²⁶ the case declaring that the imposition of capital punishment on mentally retarded offenders violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. In *Roper v. Simmons*,¹²⁷ a narrow majority imposed a similar prohibition on the application of the death penalty to offenders who committed their capital crimes while under the age of eighteen. Justice Stevens assigned the *Roper* opinion to Justice Kennedy, just as he did with the opinion assignment in *Kennedy v. Louisiana*,¹²⁸ the case that found an Eighth Amendment violation in the imposition of capital punishment for the non-fatal rape of a child. Although these decisions are vulnerable to reversal by a future Court with only a modest change in composition, they currently have imposed significant changes on the law of capital punishment.

C. Terrorism Suspects in U.S. Custody

Justice Stevens assigned to Justice Kennedy the majority opinion in *Boumediene v. Bush*,¹²⁹ the decision that confirmed the constitutional privilege of habeas corpus for Guantanamo detainees, despite efforts by the Bush administration and Congress to create a statute to deny federal court jurisdiction

124. *Blakely v. Washington*, 542 U.S. 296 (2004).

125. *Id.* at 313 ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

126. *Atkins v. Virginia*, 536 U.S. 304 (2002).

127. *Roper v. Simmons*, 543 U.S. 551 (2005).

128. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

129. *Boumediene v. Bush*, 553 U.S. 723 (2008).

over such cases.¹³⁰ This 2008 decision came four years after a self-assigned majority opinion by Justice Stevens in *Rasul v. Bush*¹³¹ that rejected an earlier effort by the Bush administration to claim that foreign detainees at the U.S. Navy base in Cuba were outside of the jurisdiction of the U.S. courts. Although *Rasul* was not classified as an “important” decision, it reinforces the recognition of Justice Stevens’s attention to and impact on this significant issue concerning federal court jurisdiction, the rights of foreign detainees, and the Bush administration’s attempt to create executive authority to impose indefinite, incommunicado detention on terrorism suspects.¹³²

In an important case on a related issue, Justice Stevens assigned to himself the majority opinion in *Hamdan v. Rumsfeld*,¹³³ the decision that rejected executive and congressional efforts to create military commission procedures for trials of foreign terrorism detainees in which the detainees would have few of the normal evidentiary and procedural protections that are essential elements of criminal trials. The effect of the decision was to force the U.S. government to develop fairer procedures for the planned military commission proceedings.¹³⁴ This opinion by Justice Stevens is likely to stand as one of the most important and memorable in history because, in Jeffrey Toobin’s words, “the case was crucial, and not just because the detainees in Guantanamo Bay faced the possibility of execution by their American captors. The lawsuit was about defining the meaning of the Constitution in the age of terror.”¹³⁵ The opinion by Justice Stevens in the case was all the more

130. Kate Zernike, *Senate Passes Detainee Bill Sought By Bush*, N.Y. TIMES, Sept. 28, 2006, <http://www.nytimes.com/2006/09/28/washington/29detaincnd.html>.

131. *Rasul v. Bush*, 542 U.S. 466 (2004).

132. There were additional Supreme Court decisions concerning both American and foreign detainees, including an American terrorism suspect held in U.S. military prisons. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). See also Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*, 39 VAL. U. L. REV. 783 (2005).

133. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

134. See Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES Sept. 29, 2006, <http://www.nytimes.com/2006/09/29/washington/29detain.html>.

135. TOOBIN, *supra* note 50, at 322.

striking because “[w]riting in his usual restrained style, Stevens made clear that he and his colleagues regarded the Bush [administration] position as something close to lawless.”¹³⁶ Future Supreme Court majorities may decide to compromise the Constitution in the aftermath of new conflicts with terrorist groups, either from a fear-driven concern about homeland security or a philosophical desire to increase executive power.¹³⁷ Yet the opinions assigned by Justice Stevens, including those that he assigned to himself, will continue to serve as reminders to future Justices and the public about the importance of maintaining a system of law to limit government power and protect individuals from unfairness and abuse. And those opinions will presumably provide precedential ammunition for those who defend federal court jurisdiction, due process, and the constitutional entitlement to habeas corpus.

D. First Amendment

In 2000, Justice Stevens assigned to himself the majority opinion in *Santa Fe Independent School District v. Doe*.¹³⁸ The Supreme Court examined an Establishment Clause challenge to a public high school’s practice of permitting student-led prayers to be read over the public address system at home varsity football games.¹³⁹ On behalf of a six-member majority, Justice Stevens concluded that the school’s policy was invalid as a violation of the First Amendment.¹⁴⁰ The opinion expanded the applicability and confirmed the continuing vitality of the Court’s 1992 precedent in *Lee v. Weisman*¹⁴¹ that invalidated clergy-led prayers at public school graduation ceremonies.

In 2010, Justice Stevens was SAJ in the majority for

136. *Id.* at 321.

137. The aftermath of the tragic terrorist attacks on September 11, 2001 provided ample evidence of the inclinations of many Americans, including government officials and even Supreme Court Justices, to compromise or eliminate constitutional principles that previously enjoyed consensus support by both liberal and conservative Supreme Court Justices. See Christopher E. Smith, *The Bill of Rights After September 11th: Principles or Pragmatism?*, 42 DUQ. L. REV. 259 (2004).

138. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

139. *Id.* at 294.

140. *Id.* at 313.

141. *Lee v. Weisman*, 505 U.S. 577 (1992).

Christian Legal Society v. Martinez,¹⁴² a case that arose when a Christian student organization was denied recognition and resources as a registered student organization by the University of California Hastings College of Law.¹⁴³ The law school regarded its Nondiscrimination Policy as requiring registered student organizations to accept all students as members, regardless of those individuals' status or beliefs.¹⁴⁴ The Christian student organization, however, required its members to sign a "statement of faith" and pledge to live their private lives according to specific principles that prohibited, among other things, sexual activity outside of marriage and "unrepentant homosexual conduct."¹⁴⁵ In Justice Ginsburg's opinion, the five-member majority rejected the student group's claim of a constitutional rights violation and upheld the "all-comers" policy of the law school for recognized student organizations.¹⁴⁶ Justice Stevens wrote a concurring opinion to specifically refute arguments raised in the dissenting opinion by Justice Alito.¹⁴⁷ As with other issues decided by a deeply-divided Court, matters concerning religion are vulnerable to possible reversal if the Court's composition changes in the future. Whatever decisions a newly-constituted Court may make in the future, the opinions assigned and written by Justice Stevens will provide ammunition for those who wish to defend current doctrines that prohibit sponsored prayer in public schools and that support public universities' nondiscrimination policies for registered student organizations.

E. Federal Power

An important case early in Justice Stevens's post-Blackmun period as dominant SAJ concerned an attempt by Arkansas to impose term limits on its representatives and senators in the U.S. Congress. In *U.S. Term Limits v. Thornton*,¹⁴⁸ Justice Stevens's self-assigned majority opinion on behalf of a narrow five-Justice bloc invalidated the term

142. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

143. *Id.* at 2980–81.

144. *Id.* at 2979.

145. *Id.* at 2980.

146. *Id.* at 2993–95.

147. *Id.* at 2995 (Stevens, J., concurring).

148. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

limits provision of the Arkansas Constitution as violating the sections of the U.S. Constitution that address the qualifications of members of Congress.

In 2005, Justice Stevens's self-assigned majority opinion in *Gonzales v. Raich*¹⁴⁹ held that congressional power under the Commerce Clause included the authority to prohibit local cultivation and use of marijuana in California, even though such actions for medicinal purposes were permitted under state law.¹⁵⁰ Justice Stevens emphasized that the issue in the case was solely about congressional authority to regulate economic activities,¹⁵¹ and therefore the Court was not called upon to consider the "respondents' strong arguments that they will suffer irreparable harm because . . . marijuana does have valid therapeutic purposes."¹⁵² The case was very significant because it gave Justice Stevens the opportunity to establish a new precedent that affirmed the importance of federal legislative power for the regulation of economic activities and to push back against conservative Justices' successful efforts to limit the scope of congressional commerce power.¹⁵³

The foregoing selected examples of Justice Stevens's majority opinion assignments as SAJ help to illuminate the range of issues affected by Stevens-assigned opinions and his personal impact in shaping the law, especially for those cases in which he wrote self-assigned majority opinions. Clearly, Justice Stevens left his imprint on the development of law for the important issues of the day that were presented to the nation's highest court during his years as the dominant SAJ.

V. CONCLUSION

The retirement of Justice John Paul Stevens, one of the

149. *Gonzales v. Raich*, 545 U.S. 1 (2005).

150. *Id.* at 17–19.

151. *See id.* at 9 ("The question before us . . . is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.").

152. *Id.*

153. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (narrow majority on Supreme Court invalidated as an excessive assertion of congressional commerce power a federal statute that sought to give women opportunities to sue those who subjected them to violent victimization); *United States v. Lopez*, 514 U.S. 549 (1995) (narrow majority on Supreme Court invalidated as an excessive assertion of congressional commerce power a federal statute aimed at keeping guns away from schools).

longest-serving Justices in U.S. Supreme Court history, marks an occasion for evaluating his place in history and his impact on law and policy. Not surprisingly, Justice Stevens himself says that “[y]ou judge [J]ustices by the work product that they produce when they’re on the Court.”¹⁵⁴ Thus, with respect to himself, he observed that “I just hope people will make their judgments based on what my written opinions say, and not on what people say they say.”¹⁵⁵ Because Justice Stevens was a prolific author of opinions,¹⁵⁶ there is no doubt that his words and reasoning will continue to influence and define American law for years after his final participation in a Supreme Court decision.¹⁵⁷

Judicial opinions alone do not define a Justice’s impact while serving on the Court. Social scientists have recognized that institutional aspects of the Court’s structure and procedures, including opinion assignment, may affect case outcomes and the content of opinions.¹⁵⁸ As demonstrated in the foregoing discussion, Justice Stevens had numerous opportunities to influence the Court’s opinions through his role as dominant SAJ. Because of circumstances that led him to be the longest-serving Associate Justice for the final sixteen terms of his career at a historical moment when he

154. BRIAN LAMB, SUSAN SWAIN & MARK FARKAS, EDS., *THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS* 50 (2010).

155. Barbara A. Perry, *Justice John Paul Stevens’ Supreme Court Odyssey: From Gerald Ford Republican to Barack Obama Democrat*, Center for Politics Online Guest Column, Apr. 15, 2010, <http://www.centerforpolitics.org/crystalball/articles/bap2010041501/>.

156. By the end of the 2004 term, Justice Stevens had written 362 majority opinions, 560 dissenting opinions, and 341 concurring opinions. EPSTEIN ET AL, *supra* note 44, at 636.

157. Supreme Court precedents that define law can remain valid and vital indefinitely, as evidenced by current precedents that continue to define the law long after their authors have left the Court. For example, *Trop v. Dulles*, 356 U.S. 86 (1958), which was written by Chief Justice Earl Warren (Supreme Court tenure 1953–1969, *THE SUPREME COURT AT WORK, supra* note 42, at 197) continues to provide the rule for evaluating claims concerning the Cruel and Unusual Punishments Clause more than fifty years after the precedent was established. See JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 243, 255 n.161 (9th ed. 2010).

158. See Sue Davis, *The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 135–54 (Cornell W. Clayton & Howard Gilman eds., 1999) (review of social science research on the role of the Chief Justice, including opinion-assignment power).

regularly disagreed with the Chief Justices with whom he served, Justice Stevens played an especially important role as an assigner of majority opinion responsibilities. There is evidence that Justice Stevens made strategic choices about opinion assignments in some cases to gain or retain the necessary votes to keep his majority intact. He also frequently self-assigned opinions to shape the law directly with his own words and reasoning. Many of the majority opinions assigned by Justice Stevens decided issues in cases that are widely acknowledged to be of great importance for the major controversies of his era, including the rights of gays and lesbians, federal power, and access to the courts for detainees suspected of participating in terrorist plots against the United States. Whether or not these precedents survive subsequent scrutiny by the Court as new Justices are appointed in the coming decades, it is clear that these opinions had a profound impact on American society and law from the final decade of the twentieth century through the first decade of the twenty-first century.